



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Denial of a Driveway  
Application by the Department of Transportation  
to Michael and Sarah Errington

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Case No. TR-11-0006

**FINAL DECISION**

By letter received on February 9, 2011, Sarah Errington requested a hearing pursuant to Wis. Stat. § 86.073(3) to review a denial issued by the Department of Transportation (Department) of an application for a permit to construct a driveway access from State Highway 70 to their property located at 2905 State Highway 70 East, Eagle River, Wisconsin. In response to the request, the administrative law judge assigned to the matter conducted a prehearing conference on February 18, 2011. During the prehearing conference the attorney for the Department indicated that he intended to file a motion seeking the dismissal of Ms. Errington's request for a hearing. Accordingly, no evidentiary hearing was scheduled and a briefing schedule for the motion was established. In accordance with the established schedule, the Department filed its Motion to Dismiss on March 18, 2011. Michael and Sarah Errington filed a response to the motion on May 19, 2011; and, the Department filed a reply on May 24, 2011.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Michael and Sarah Errington, petitioners  
2905 State Highway 70 East  
Eagle River, WI 54521

Wisconsin Department of Transportation, by

Attorney John J. Sobotik  
DOT – Office of General Counsel  
P. O. Box 7910  
Madison, WI 53707-7910

The Administrative Law Judge issued a Proposed Decision granting the Department's motion on July 22, 2011. On August 9, 2011, the Department filed a letter in support of the Proposed Decision. No other comments on the Proposed Decision were received. The Proposed Decision is adopted as the final decision in this matter.

This matter involves the denial of an application for a state driveway access permit. Pursuant to Wis. Stat. § 86.07(3), the Division of Hearings and Appeals (Division) has jurisdiction to conduct hearings to review denials of applications for driveway access permits issued by the Department of Transportation (Department). Wis. Stat. § 86.07(3) provides that a request for an administrative hearing to review the denial of an application for a state driveway access permit must be filed within thirty days of the date the Department's decision is mailed. The Erringtons' application for a permit is dated September 24, 2010. The final denial of their application is dated December 22, 2010. The Department mailed the denial on the same day (affidavit of Michael Roach). Accordingly, to be timely the Erringtons request for a hearing to review the denial needed to be filed with the Division by January 21, 2011.

On page two of its denial the Department advised the Erringtons of the thirty day deadline for requesting a hearing and that request should be filed with the Division. The denial letter provided the mailing address for the Division. The Division accepts materials from parties by both facsimile transmission and first class mail. (Wis. Admin. Code § HA 1.03(2)). Materials filed by first class mail are considered filed on the date of the postmark (Wis. Admin. Code § HA 1.03(3)(a)). The Erringtons' request for a hearing filed was filed by first class mail. The request was postmarked on February 7, 2011, and was received by the Division on February 9, 2011. The Erringtons' request for hearing was not filed with the Division within thirty days of the Department's denial.

The Erringtons' letter requesting a hearing is dated January 10, 2011 and addressed to the Department. A post-it note attached to the letter requesting a hearing filed with the Division contains a statement from Sarah Errington. In the statement, Ms. Errington indicates she "was only recently informed that [her request for a hearing] was sent to the wrong address." There is no indication in any of the documents filed with the Division who informed the Erringtons that their request for a hearing was mailed to the wrong address.<sup>1</sup> When they became aware that they failed to mail their request to the Division, the Erringtons sent a copy of it to Division. In their reply to the Department's motion, the Erringtons do not deny that the request for a hearing was not filed timely with the Division. The explanation on the post-it note attached to the copy of the request for hearing filed with the Division could be interpreted as an assertion that good cause exists for filing the request for a hearing with the Division untimely. However, there is no authority for the Division to consider good cause as grounds for denying the Department's motion. Accordingly, the Department's request must be granted.

Dismissing the Errington's request for a hearing because it was not timely filed is a harsh result. Wisconsin courts have frequently been presented with situations where the strict interpretation of a filing requirement would direct a harsh result upon one of the litigants. In these cases the courts have consistently come down on the side of enforcement of statutory filing

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<sup>1</sup> The Department's denial letter also directed the Erringtons to file a copy of their request for a hearing with the Department. Since the Erringtons were directed to send a copy of their request for a hearing to the Department, it is inaccurate to say they sent their request to the wrong address. It would be more accurate to state they failed to also send it to the Division.

requirements. *e.g.*, *Gomez v. Labor and Industry Review Commission*, 153 Wis. 2d 686, 451 N.W.2d 475 (Wis. Ct. App. 1989). While strict enforcement of statutory filing deadlines may seem unduly harsh, strict construction is appropriate for policy reasons. Strict construction of the plain mandatory language helps “to maintain a simple orderly and uniform way of conducting legal business in our courts. Uniformity, consistency, and compliance with procedural rules are important aspects of the administration of justice.” *519 Corp. v. DOT*, 92 Wis. 2d 276, at 288, 284 N.W.2d 643 (1979). It should also be noted that the dismissal of the Erringtons’ request for a hearing does not foreclose them from reapplying for a driveway access permit and restarting the process.

### Ruling

Michael and Sarah Errington’s request for hearing to review the Department of Transportation’s denial of their application for a permit to construct a driveway access was not timely and must be DISMISSED.

Dated at Madison, Wisconsin on August 30, 2011.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
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By: \_\_\_\_\_  
Diane E. Norman  
Assistant Administrator

## **NOTICE**

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.